No. 86-940

In the Supreme Court of the United States

OCTOBER TERM, 1986

PACIFIC FIRST FEDERAL SAVINGS BANK, ET AL.

v.

WAYNE C. REMBOLD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Federal Home Loan Bank Board's approval of a saving institution's application to convert from a mutual to a stock form of ownership divested the district court of jurisdiction under the federal securities laws to consider fraud claims asserted by purchasers of stock offered pursuant to the conversion.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This case arises out of the sale of stock in petitioner Pacific First Federal Savings Bank pursuant to Pacific First's conversion from a mutual to a stock form of ownership. Under the provisions of the National Housing Act and the Home Owners' Loan Act and regulations promulgated thereunder (12 U.S.C. 1725(j); 12 U.S.C. 1464(i); 12 C.F.R. Pt. 563b), Pacific First was required to obtain approval of its

conversion plan by the Federal Home Loan Bank Board (FHLBB). The approval was obtained in June, 1983, and shortly thereafter Pacific First offered its depositors preferential rights to purchase stock pursuant to a subscription offering circular (Pet. App. 2a).

Respondents, who allege that they purchased 328,726 shares of stock in reliance on the circular, filed suit in February, 1985, in the United States District Court for the District of Oregon, charging violations of the antifraud provisions of the federal securities laws (Pet. App. 2a).[1] The complaint alleged that the offering circular contained numerous material misrepresentations, including misrepresentations concerning the value of Pacific First's loan and real estate portfolios, the adequacy of its reserves against future losses and its anticipated future earnings (Br. in Opp. App. 4a-6a).

The district court dismissed the suit for lack of subject matter jurisdiction. The court held that it had no jurisdiction to hear respondents' securities law claims because, under 12 U.S.C. 1725(j)(2) and 1730a(k), judicial review of an FHLBB order ap-

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[1] Respondents alleged that petitioners violated Sections 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. 77*l*(2) and 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5. The complaint also alleged violations of Oregon and Washington securities laws and several common law torts. In addition to Pacific First, the complaint named as defendants petitioners Kaplan, Smith & Associates, Inc., a financial consulting firm that appraised the stock, and Price Waterhouse, an independent accounting firm that rendered an opinion on the financial statements in the circular.

proving a conversion plan may be obtained only in a United States court of appeals (Pet. App. 22a).[2]

The Ninth Circuit reversed. The court of appeals first noted that the antifraud provisions of the federal securities laws apply generally to sales of savings institution securities. Pet. App. 5a (citing *Tcherepnin* v. *Knight*, 389 U.S. 332, 340-342 (1967)). It then concluded that nothing in the legislation granting authority to the FHLBB to approve conversions either expressly or impliedly exempts from the federal securities laws a sale of securities pursuant to a conversion. In this connection, the court observed that the exclusive review provision applies only "to the right to review by a party aggrieved by an 'order' of the FHLBB approving or disapproving a conversion plan" (Pet. App. 7a). "The [FHLBB review] statute makes no reference to the right to maintain a private cause of action against the savings institution by a person who has suffered damages as the result of misrepresentations in a *stock offering circular*" (*ibid.* (emphasis added)). Indeed, the court noted (*id.* at 7a-8a), the FHLBB specifically requires that conversion stock offering materials contain a legend stating that the FHLBB

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[2] 12 U.S.C. 1725(j)(2) provides in pertinent part:

> Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board * * * which approves, with or without conditions, or disapproves a plan of conversion pursuant to this subsection only by complying with the provisions of [12 U.S.C. 1730a(k)] * * *.

See also 12 U.S.C. 1464(i)(4). 12 U.S.C. 1730a(k) in turn vests exclusive jurisdiction to review orders of the FHLBB in the United States courts of appeals and provides that review must be sought within 30 days of the final action at issue.

has not passed on the accuracy or adequacy of the offering circular. 12 C.F.R. 563b.7(d), 563b.102.

DISCUSSION

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. In particular, it does not conflict with the decisions of two other courts of appeals that have considered the relationship between the conversion process and enforcement of the securities laws. Accordingly, review by this Court is not warranted.

1. The antifraud provisions of the federal securities laws clearly apply to the offer and sale of securities issued by savings institutions. See *Tcherepnin* v. *Knight*, *supra* (withdrawable capital shares of savings institution are securities for purposes of the securities laws). Although Congress exempted securities issued by savings institutions from certain registration requirements of the securities laws, 15 U.S.C. 77c(a)(5)(A), it did not exempt such securities from the antifraud provisions of those laws.

Common stock issued pursuant to a conversion from a mutual to a stock form of ownership is no exception to this general rule. In granting authority to the FHLBB to approve conversions, Congress did not in any way suggest that investors in converted thrift companies should be deprived of the protections against securities fraud available to investors in other companies. The exclusive jurisdiction provision applicable to conversions is limited to final orders of the FHLBB that approve or disapprove a conversion plan. It does not purport to extinguish federal securities fraud claims that may arise as a result of materially false or misleading statements

in offering documents distributed by converting savings institutions.

This Court has repeatedly held that "repeals by implication are not favored." *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)). Repeal may be implied only where there is a "plain repugnancy" between statutory schemes. *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682-683 (1975). Petitioners in this case can demonstrate no such repugnancy. FHLBB regulation of conversions is fully compatible with the antifraud provisions of the securities laws. Indeed, the FHLBB has itself concluded that "the antifraud provision[s] of the federal securities laws are applicable to all offers for sale of securities, assuming the use of jurisdictional means * * *." 48 Fed. Reg. 31614-31615 (1983) (comment accompanying amendments to FHLBB disclosure regulations, 12 C.F.R. Pts. 563b, 563c, 563d).

In *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), this Court found no conflict between state regulation of insurance companies and the normal operation of the securities laws. The SEC in that case alleged misrepresentations and omissions in communications to shareholders concerning a merger of two insurance companies. The defendants argued that the action was barred by Section 2(b) of the McCarran-Ferguson Act, which provides that no federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). They contended that, because the state director of insurance had approved the merger and found it not to be inequitable or contrary to law, the merger was immune from challenge by the SEC.

This Court disagreed, concluding that approval of the merger by the state did not conflict with the requirement of the securities laws "that insurance companies speak the truth when talking to their shareholders" (*ibid.*).

Similarly, there is no reason why FHLBB approval of a plan of conversion should preclude application of the securities laws to misstatements and omissions in the offering circular of a converting institution. FHLBB regulations prohibit representations in the offering circular that the FHLBB has passed on the circular's accuracy or adequacy (12 C.F.R. 563b.7 (d)) and require that a notice to that effect appear in the circular itself. 12 C.F.R. 563b.102. Such a notice appeared in the circular that respondents challenge in this case.

Adoption of petitioners' position could virtually immunize converting institutions from liability for misstatements and omissions in their offering materials. Judicial review of an FHLBB order approving or disapproving a conversion must be sought within 30 days of the order. 12 U.S.C. 1730a(k). Investors will often not be able to discover a misstatement within that time, particularly since they may not even have purchased their stock by then. Indeed, the conversion stock offering itself may not be made within that 30-day period. See 12 C.F.R. 563b.3(c)(11). As the court of appeals noted, one should not assume that Congress intended such an untoward result without an "unmistakable expression" to that effect (Pet. App. 8a).

2. The decisions of the two other courts of appeals that have indirectly addressed this issue do not conflict with the decision of the court below. In each case the court found that, on the facts presented, the

asserted securities law claims were in reality a challenge to the FHLBB order approving the particular conversion. *Harr* v. *Prudential Fed. Sav. & Loan Ass'n*, 557 F.2d 751 (10th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); *Craft* v. *Florida Fed. Sav. & Loan Ass'n*, 786 F.2d 1546 (11th Cir. 1986). In light of the exclusive jurisdiction vested in courts of appeals to hear such challenges, the courts of appeals therefore concluded in each case that the district court lacked jurisdiction to hear the disguised attack on the FHLBB's order. But the decisions do not purport to divest the district courts of jurisdiction to hear legitimate federal securities law claims that do not challenge an FHLBB conversion order.

The *Harr* plaintiffs alleged that the date of record selected by the savings and loan, and approved by the FHLBB, for determining ownership in the mutual association (to qualify for free stock) was part of a conspiracy to benefit the association's directors and officers, and that the conversion plan itself was somehow a fraudulent and deceptive device in violation of Section 10(b) and Rule 10b-5. They also alleged that the proxy materials were misleading, but the complaint failed to identify any false or misleading statements. Under these circumstances, the Tenth Circuit correctly concluded that "the sole thrust of plaintiff's argument" was that the Board should not have approved the plan and that the allegations of securities fraud were at bottom "nothing more than an assertion that the plan is wrong and should not have gone into effect." 557 F.2d at 754. See also *Harr* v. *FHLBB*, 557 F.2d 747 (10th Cir. 1977), cert. denied, 434 U.S. 1033 (1978) (in which the *Harr* plaintiffs directly challenged the FHLBB's approval of the conversion).

Similarly, the plaintiffs in *Craft* challenged a decision, approved by the FHLBB after the plaintiffs had subscribed to a conversion plan, to increase the number of shares in the public offering. They argued that the savings and loan was obligated to recirculate the offering materials and permit rescission by the original subscribers. The court held that the suit was a challenge to the plan itself and that the district court lacked jurisdiction to hear plaintiffs' claim under 12 U.S.C. 1725(j)(2) and 1730a(k). The court stressed that plaintiffs' fraud claims were merely "bare bones allegations made to escape [these] exclusive review provisions" and that plaintiffs had not in fact "allege[d] any false or misleading statements" (786 F.2d at 1554). The court specifically noted that it was *not* saying that the district court would not have jurisdiction over a claim of securities fraud (*ibid.*):

> We are not called upon here to decide, nor do we express any views concerning the jurisdiction *vel non* of the district court under the federal securities laws when securities fraud is properly alleged and there has been Bank Board approval of a savings and loan conversion.

Respondents here allege garden variety securities fraud—that they purchased securities based on misrepresentations concerning the financial condition of Pacific First. As the court below concluded (Pet. App. 11a), these claims state an antifraud cause of action under the securities laws, which the district court properly should consider on the merits.[3] In

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[3] Petitioners contend (Pet. 13-14) that, because one of the numerous allegations of misstatements in the offering circular is comparable to the allegation in *Craft* (*i.e.*, the sale of addi-

contrast, *Harr* and *Craft* essentially attacked the decision of the FHLBB in approving the conversion plan and were correctly dismissed on jurisdictional grounds. All of these decisions stand for a single proposition: that the district courts have jurisdiction to hear valid claims of securities fraud in connection with an approved conversion, but lack jurisdiction to hear a challenge to an FHLBB approval in the guise of a securities law claim.[4] No court has reached a contrary conclusion.

3. Petitioners also contend (Pet. 11-12) that applying the antifraud provisions of the federal securities laws to offers and sales of stock issued by converting thrift institutions will destabilize the conversion process and threaten the viability of the thrift industry. That contention is baseless. As far as we are aware, only one of the several hundred institutions that have converted under the FHLBB regulations to date has faced properly alleged claims for securities fraud. Moreover, the FHLBB has expressly endorsed the value of full and fair disclosure by savings institutions as *fostering* the ability of insured institutions to raise capital and *improving* institu-

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tional stock to the public), this case is indistinguishable from *Craft*. That argument ignores the additional detailed claims of fraud alleged by respondents here, including false statements concerning the value of Pacific First's loan and real estate portfolios, the adequacy of its reserves and its reasonably anticipated future earnings.

[4] The FHLBB filed *amicus* briefs in the court of appeals in *Harr* and in the district court in *Craft*. The SEC filed *amicus* briefs in the court of appeals in both *Craft* and the present case. The positions urged by the agencies were consistent with each other, consistent with the decisions reached by the courts of appeals in the two earlier cases, and consistent with the decision by the court below in this case.

tional safety and soundness. See 50 Fed. Reg. 53284, 53285 (1985).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners further argue that, to the extent an adverse judgment would require Pacific First to rescind its sales contracts, such a remedy would violate FHLBB regulations restricting repurchases. See 12 C.F.R. 563b.3g). The argument is ill-founded for two reasons. First, respondents here do not seek rescission, only damages. Second, it is premature to consider the possible effects of particular remedies, since this case in its present posture "involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the [respondents] * * *." *Tcherepnin* v. *Knight*, 389 U.S. at 346.

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